remanding to the district court solely for "determination of entitlement to [attorneys] fees incurred in District Court, and the amount, if any, to be awarded". (Petitioners' App. C)

Petitioners sought discretionary review with the Washington Court of Appeals. They filed a two page "Motion for Discretionary Review" listing as an issue "Jury Selection: due process". They did not mention the United States Constitution, nor did they include any legal argument on this issue. (Respondent's App. A)

On January 3, 2003, a commissioner of the court of appeals denied review. (Respondent's App. B) The court noted that at oral argument, petitioners' counsel "appeared to suggest that the jury selection issue raised a significant question of constitutional law". (*Id* at 4) The court refused to consider this issue because it had not been briefed, stating "the law surrounding the constitutional implications of denials of challenges for cause has become extremely complex, *see, e g, State v Fire*, 145 Wash.2d 152, 34 P.3d 1218 (2001); without detailed briefing, it is impossible to know whether this case presents an appropriate issue for discretionary review". (*Id*) On May 7, 2003, a panel of the court of appeals denied a motion to modify the ruling by the commissioner.

Petitioners then filed a motion for discretionary review with the Washington Supreme Court. However, their motion was untimely because it was filed on June 9, 2003, more than thirty days after the court of appeals denied the motion to

modify. WASHINGTON RULE OF APPELLATE PROCEDURE 13.5(a). On September 16, 2003, the supreme court denied petitioners' request for an extension, and did not reach the merits of the motion for discretionary review.[1] (Respondent's App. C)

On December 3, 2003, the superior court remanded the matter back to district court. Petitioners then filed a motion for attorney's fees. Petitioners did not differentiate in their motion between James Allison's and Flora Allison's requests for fees. Petitioners failed to mention due process, equal protection, or the United States Constitution. On February 18, 2004, the district court denied petitioners' motion, ruling:

> It is abundantly clear from the trial record in this case that Plaintiffs have come before this court requesting attorney fees and costs with 'unclean hands'. The material misrepresentations of facts and circumstances made by Plaintiffs to Defendant in connection with the insurance claim investigation of purported damage to Plaintiffs' vehicle violated the terms of the insurance contract, as well as the public policy

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[1] The Washington Supreme Court did note, however, that the court of appeals did not err when it concluded petitioners' "initial motion for discretionary review was wholly inadequate". The court also stated that were it to consider the motion for discretionary review, it would deny it On the jury selection issue, the court stated that "the record on this point is at best sketchy And while a prospective juror's relationship with State Farm might have provided grounds for challenge had counsel pursued the matter more thoroughly or made a clearer record, he did not " The court did not reach any constitutional issue

> of this state and were prejudicial to the Defendant.[2]

(Petitioners' App. D at v)

Petitioners then appealed this ruling to King County superior court. Petitioners for the first time claimed Mrs. Allison should be awarded fees as an "innocent spouse". Petitioners did not mention due process, equal protection, or the United States Constitution. On August 20, 2004, the superior court affirmed the denial of fees based on material misrepresentations. The court stated: "The court finds no error regarding Mrs. Allison's fees because the issue was not raised before Judge Kato's ruling." (Petitioners' App. E)

Petitioners then sought discretionary review with the Washington court of appeals. Petitioners did not mention due process, equal protection, or the United States Constitution. Petitioners attempted to reopen issues decided on the earlier appeal. On June 20, 2005, the court of appeals issued its "Commissioner's Ruling Denying Discretionary Review". The court first ruled that the only issue before it was the denial of attorney's fees, because all of the other issues raised were litigated or could have been litigated in the earlier appeal.

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[2] The insurance policy provided: "There is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy."

"These issues have either been decided or waived". The court also noted that the "innocent spouse" argument was not raised in the district court, and agreed with the superior court that the issue was waived. The court did not reach any constitutional issue. (Petitioners' App. H) On April 12, 2005, a panel of the court of appeals denied a motion to modify the ruling by the commissioner. (Petitioners' App. I)

Petitioners filed a motion for discretionary review with the Washington Supreme Court. Petitioners did not mention due process, equal protection, or the United States Constitution. On August 4, 2005, the supreme court issued its Ruling Denying Review. The court agreed with the court of appeals that most of petitioners' arguments were either rejected in the prior appeal or waived. The court found no basis for discretionary review. The court did not reach any constitutional issue. (Petitioners' App. F)

JURISDICTION

This Court lacks jurisdiction because the constitutional issues asserted by petitioners were not raised before the trial court and were not properly raised, briefed, or argued before the state appellate courts, and therefore those courts declined to consider them based on state procedural grounds. 28 U.S.C. § 1257. Further, with respect to the jury selection issue, petitioners failed to file their petition for writ of certiorari within ninety days after entry of the Ruling Denying Extension

entered by the Washington Supreme Court on September 16, 2003. 28 U.S.C. § 2101(c).

REASONS WHY PETITION SHOULD BE DENIED

A. THE COURT SHOULD DECLINE TO CONSIDER THE PETITION BECAUSE PETITIONERS HAVE FAILED TO COMPLY WITH RULE 14.4.

Rule 14.4 provides that the failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition. Petitioners failed to specify the stage of the proceedings in the trial court and in the appellate courts when the federal questions sought to be reviewed were raised; the manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears so as to show that the federal questions were timely and properly raised and that this Court has jurisdiction, as required by Rule 14.1(g). Petitoners also failed to include in their appendix all opinions and orders entered in conjunction with the judgment sought to be reviewed, as required by Rule 14.1(i). This Court should therefore deny the petition.

B. THIS COURT LACKS JURISDICTION OVER THE JURY SELECTION ISSUE BECAUSE THE STATE APPELLATE COURTS DECLINED TO CONSIDER THE ASSERTED CONSTITUTIONAL ISSUE BASED ON STATE PROCEDURAL GROUNDS.

This Court lacks jurisdiction over the jury selection issue because the state appellate courts declined to consider the asserted constitutional issue based on state procedural grounds. Petitioners' counsel never mentioned due process or the United States Constitution in the state district court when he challenged and objected to jurors. Petitioners never raised due process on appeal to the state superior court. When seeking discretionary review to the court of appeals, petitioners listed "Jury selection: due process" as an issue, but they did not mention the United States Constitution. The court declined to consider the issue because petitioners failed to provide any argument in their motion supporting this issue. Petitioners failed to timely seek review before the Washington Supreme Court, and therefore that court did not consider the due process issue.

The Washington Court of Appeals followed state law when it declined to consider the Constitutional issue. Washington appellate courts will not consider claims that are not argued or briefed on appeal. *Hiatt v Walker Chevrolet Co*, 120 Wash.2d 57, 67, 837 P.2d 618 (1992). This is particularly true with respect to constitutional arguments. "'Parties raising constitutional issues must present considered

arguments to this court. We reiterate our previous position: "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion"'". *Health Ins. Pool v. Health Care Authority*, 129 Wash.2d 504, 511, 919 P.2d 62 (1996) (quoting *State v. Johnson*, 119 Wash.2d 167, 171, 829 P.2d 1082 (1992)). *Accord Wallace v. Evans*, 131 Wash.2d 572, 579, 934 P.2d 662 (1997) (refusing to consider equal protection claim based on "extremely careless assumptions").

The Washington Supreme Court also followed state law when it declined review because petitioners' motion for discretionary review was untimely under WASHINGTON RULE OF APPELLATE PROCEDURE 18.8. See *Shumway v. Payne*, 136 Wash.2d 383, 396-97, 964 P.2d 349 (1998).

This Court is without power to decide whether constitutional rights have been violated when the federal questions were not seasonably raised in accordance with the requirements of state law. *Edelman v. California*, 344 U.S. 357, 358, 73 S.Ct. 293, 97 L.Ed. 387 (1953).

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

John v Paullin, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381 (1913).

For example, in *Beck v Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), this Court held it could not entertain an equal protection contention after the Washington Supreme Court declined to consider it under state law because it was not included in assignments of error or argued in the petitioner's brief.

This Court also lacks jurisdiction because on the only occasion when petitioners mentioned due process, in the court of appeals, they failed to mention the United States Constitution. The Washington Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. WASHINGTON CONSTITUTION, art. 1, § 3. Where the state court fails to pass on a federal question, this Court will assume that the question was not properly presented. *Adams v Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). More specifically, where, as here, the petitioners make "passing invocations of 'due process'", without referencing the Federal Constitution or citing cases relying on the Fourteenth Amendment, and the state Constitution contains a due process guarantee, the petitioners fail in their burden to make clear that a federal claim was properly presented to the state court. *Id.* at 89 n.3; *Air Pollution Variance Board of Colorado v Western Alfalfa Corp*, 416 U.S. 861, 866, 94 S.Ct. 2114, 40 L.Ed.2d 607

(1974); *Bowe v Scott*, 233 U.S. 658, 663, 34 S.Ct. 769, 58 L.Ed. 1141 (1914). This Court should therefore deny certiorari.

C. THIS COURT LACKS JURISDICTION OVER THE "INNOCENT SPOUSE" ISSUE BECAUSE PETITIONERS NEVER RAISED DUE PROCESS OR EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION BEFORE THE STATE COURTS.

Petitioners never asserted in any of the state courts below that the denial of attorneys fees to Flora Allison violated due process, equal protection, or the United States Constitution. The state courts never decided any federal constitutional issue.

This Court has no jurisdiction to reexamine the final judgment of a state court unless the record shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496-97, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); *Bailey v. Anderson*, 326 U.S. 203, 207, 66 S.Ct. 66, 90 L.Ed. 3 (1945). When the highest state court has failed to pass upon a federal question, this Court will assume that the omission was due to want of proper presentation in the state courts unless petitioners can affirmatively show to the contrary. *Webb*, 451 U.S. at 495-96. Here, the federal consitutional issues were neither raised before nor decided by the state courts. This Court therefore has no jurisdiction, and should deny certiorari.

D. PETITIONERS HAVE NOT SATISFIED ANY OF THE CONSIDERATIONS FOR ACCEPTANCE OF REVIEW UNDER RULE 10.

Petitioners have not satisfied any of the considerations for acceptance under Rule 10. The only consideration raised is (c), that a state court has decided an important question of federal law that has not been, but should be, settled by this Court. Petitioners fail to argue why the questions they raise are important, other than the bald assertion that the questions affect "hundreds of millions of insureds who potentially face their own insurance companies in court". (Petition at 8) Petitioners fail to provide any factual support for this statement, and its veracity appears questionable. Petitioners also fail to provide any rationale why these questions should be settled by this Court. Petitioners have failed to provide this Court with a reason to exercise its judicial discretion to accept this petition.

E. PETITIONERS HAVE FAILED TO PRESENT ARGUMENT, AUTHORITIES, OR A FACTUAL RECORD TO THIS COURT SUPPORTING A VIOLATION OF DUE PROCESS UNDER THE UNITED STATES CONSTITUTION RELATING TO JURY SELECTION.

Petitioners assert a "right of trial by jury". (Petition at 4) They cite no authorities and present no legal argument supporting such a right under the United States Constitution, or its violation in this instance. Petitititioners cite primarily state court cases decided based on state law grounds. In addition,

they cite one federal court opinion deciding a state law case under diversity jurisdiction based on nonconstitutional grounds. *Getter v. Wal-Mart Stores, Inc*, 66 F.3d 1119, 1122 (10th Cir. 1995). Finally, they cite two opinions involving criminal convictions in federal court that were decided based on nonconstitutional grounds. *United States v. Cambara*, 902 F.2d 144 (1st Cir. 1990)[3]; *United States v. Ruuska*, 883 F.2d 262 (3rd Cir. 1989).

Petitioners had no right to a jury trial under the federal Constitution. Petitioners' reliance on parts of the Fifth, Sixth, and Seventh Amendments in their Constitutional and Statutory Provisions section is misplaced. (*See* Petition at 3, 4) The Fifth and Seventh amendments limit only powers exercised by the United States government, not state governments. *Chapin v. Fye*, 179 U.S. 127, 21 S.Ct. 71, 45 L.Ed. 199 (1900). The Sixth Amendment by its terms only applies to criminal prosecutions. *See United States v. Zucker*, 161 U.S. 475, 481, 16 S.Ct. 641, 40 L.Ed. 777 (1986) This Court has not extended the right to a jury trial to the states through the Fourteenth Amendment, except in state nonpetty criminal trials. *Ballew v. Georgia*, 435 U.S. 223, 229, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). This case involved a civil trial.

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[3] The holding in *Cambara* relied on by petitioners has been overruled by *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)

Due process requires only a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such ocurrences when they happen. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "'[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, . . . so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.'" *Ross v Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Petitioners cannot show any due process violation, because they have failed to show any juror was unfairly biased against them. The jurors were never asked if they had insurance policies with State Farm Mutual Automobile Insurance Company, or if they had automobile insurance policies with "State Farm". *Cf. Hill v Lamulle*, 506 So.2d 690 (La.App. 1987) (counsel failed to distinguish between State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company, which is not a mutual company, in questions to the jury). The jurors were never asked if they had assessable policies. The jurors were never asked if they paid their own insurance premiums, or if they had a direct pecuniary interest in State Farm Mutual Automobile Insurance Company. Petitioners' contention has no factual support.

F. PETITIONERS HAVE FAILED TO PRESENT ARGUMENT OR AUTHORITIES TO THIS COURT SUPPORTING ANY VIOLATION OF DUE PROCESS OR EQUAL PROTECTION REGARDING THE DENIAL OF ATTORNEYS FEES TO MRS. ALLISON.

Petitioners assert that the denial of attorneys fees to Flora Allison violated due process or equal protection. They cite no authorities and present no legal argument supporting a violation of the United States Constitution. The two cases they do cite were decided based on state law.

Petitioners raise no facts to even imply Mrs. Allison did not receive due process. Due process requires notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998). Petitioners filed a motion for attorneys fees, with argument and evidence supporting their motion. They selected the hearing date. The judge heard oral argument. The judge denied the motion. Mrs. Allison received due process.

Petitioners assert the denial of Mrs. Allison's request for attorneys violated the equal protection clause of the Fourteenth Amendment. In general, equal protection does not prohibit any classification by a state if it is rationally based. *Personel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). However, when a state makes a classification based on a suspect class such as race, alienage, or national origin, the courts will apply strict scrutiny. *City of Cleburne v. Cleburne Living Center*,

473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Even under the strict scrutiny standard, state action is not unconstitutional unless the state has a discriminatory purpose for its action. *Feeney*, 442 U.S. at 272.

Classifications based on marriage do not involve a suspect class. *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993); *In re Talmadge*, 832 F.2d 1120, 1125 (9th Cir. 1987). Therefore, the rational basis test applies.

Moreover, petitioners have not demonstrated that Mrs. Allison was treated differently because she was an "innocent spouse". Mrs. Allison was treated differently because an insured made misrepresenations in support of her insurance claim. Any person pursuing an insurance claim supported by misrepresentations would be treated the same as Mrs. Allison, regardless of marital status.

The Washington courts had a rational basis for denying attorneys fees to Mrs. Allison. They enforced a policy provision providing there is no coverage for a claim if any insured has made a misreprentation. They denied attorneys fees because a misrepresentation was made in support of the Allisons' insurance claim. Discouraging insurance fraud and enforcing insurance contracts are rational bases for treating persons pursuing insurance claims supported by misrepresentations differently from other claimants. Petitioners can show no equal protection violation.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this 9th day of February, 2006.

Respectfully submitted,

By Michael Rogers

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APPENDIX A

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

James and Flora Allison,	)	No. 50981-1-1
	)	
Appellants	)	
	)	
v.	)	
	)	
State Farm Insurance,	)	
	)	
Respondent.	)	
	)	

MOTION FOR DISCRETIONARY REVIEW

William C. Budigan, Attorney for Appellant

WSBA #13443
3705 West Barrett Street
Seattle, Washington 98199

A. Identity of Petitioner

Appellants Allison asks this court to aceept review of the decision or parts of the decision designated in Park B of this motion.

BUDIGAN LAW FIRM
3705 West Barrett
Seattle, Washington 98199-2522
(206) 284-5306

B. Decision

King County Superior court No. 01-2-25363-8SEA Rulings of 7/11/02, 7/18/02 (misdated 7/11/02 but entered and filed 7/1802), and 8/26/02 (regarding attorney fees and costs). A copy of the decision is in the Appendix.

C. Issues Presented for Review

Numerous issues on review, but main issues for granting discretionary review:

1. Jury Selection: due process.

2. Insurance Commissioner WAC admitted and/or documented violations and findings as a matter of law.

3. Attorney's fees: numerous requests for fees and application of Olympic Steamship.

D. Statement of the Case.

See attached Appellant's Memorandum Regarding Transcripts on Review and related issues and attorney's fees and costs.

E. Argument Why Review Should be Accepted.

See D.

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F. Conclusion

This court should accept review for the reasons indcated in Part E.

October 3, 2002.

Respectfully submitted,

s/_____
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APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JAMES E. ALLISON and FLORA ALLISON, Petitioners, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondents.	No. 50981-1-I COMMISSIONERS RULING DENYING MOTION FOR DISCRETIONARY REVIEW

James and Flora Allison seek discretionary review of a decision on RALJ appeal affirming a district court verdict and remanding for a determination of attorney fees under Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991). As the Allisons fail to establish any of the criteria for discretionary review set forth in RAP 2.3(d), discretionary review is denied

FACTS[1]

This case involves a December, 1997 traffic accident in which James Allison apparently struck a car occupied by Robert and Beverly Linkletter. The Linkletters' insurer sued the Allisons, and the Allisons sued their insurer, Respondent State Farm Mutual Automobile Insurance Co., as well as the Linkletters. Eventually the Allisons agreed to a judgment against them for the property damage and dismissed their claims against the Linkletters, but maintained the action against State Farm. State Farm took the position that James Allison assaulted the Linkletters with his car and denied coverage.

The Allisons' claims against State Farm went to trial in June, 2001 in Seattle District Court. The jury apparently determined that State Farm did not act in bad faith or engage in an unfair or deceptive act or practice. However, the jury found that a portion of the damage was caused by accident, and

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[1] This account of the facts is derived almost entirely from Respondent's Answer to the Motion for Discretionary Review, as Petitioners failed to provide an account of the facts in their motion

awarded damages under the policy in the amount of $1,404. The district court entered a judgment for that amount, as well as statutory attorney fees of $125.

The Allisons appealed and in July, 2002, the King County Superior Court affirmed the district court's decision on RALJ appeal "in all respects," but remanded the issue of attorney fees to the district court because it had apparently not been addressed. The Allisons filed a notice of appeal in this court. This court scheduled a hearing in October, 2002 to determine whether the decision was reviewable as a matter of right pursuant to RAP 2.2(a) and, if not, whether discretionary review pursuant to RAP 2.3(d) should be granted.

Counsel for the Allisons appeared for the motion hearing on October 4 with a very brief motion for discretionary review in hand. As neither the court nor opposing counsel had an opportunity to read it, I deemed the Allisons to have conceded that the order below was not appealable and set over the hearing on the motion for discretionary review to allow proper briefing and opposing counsel an opportunity to

respond. On October 21, 2002, counsel for the Allison filed a Motion for Discretionary Review less than two pages in length, including no citations to RAP 2.3(d) and no citations to case law.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction (RALJ) will be accepted only:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by and appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

DECISION

The Allisons' argument for discretionary review is quoted in its entirety as follows:

> C. Issues Presented for Review
>
> Numerous issues on review, but main issues for granting review:
>
> 1. Jury Selection: due process.
> 2. Insurance Commissioner WAC admitted and/or documented violations and findings as a matter of law.
> 3. Attorney's fees: numerous requests for fees and application of Olympic Steamship.
>
> D. Statement of the Case.
>
> See attached Appellants' Memorandum Regarding Transcripts on Review and related issues and attorney's fees and costs.
>
> E. Argument Why Review Should be Accepted
>
> See D.
>
> F. Conclusion
>
> This court should accept review for the reasons indicated in Part E.

Motion for Discretionary Review, pgs. 1-2.

It is Petitioners' responsibility to make the case for discretionary review in their Motion for Discretionary Review. The Allisons fail even to cite a basis for review under RAP 2.3(d). At oral argument, counsel appeared to suggest that the jury selection issue raised a significant question of constitutional law and also appeared to suggest that the RALJ decision conflicted with Dean v. Group Health Co-operative of Puget Sound, 62 Wn. App. 829, 816 P.2d 757 (1991). The Allisons' argument as to the insurance commissioner's administrative rules is completely indecipherable. Since the RALJ court remanded the attorney fees issue, it is not clear on what basis the Allisons are even aggrieved.

The Allisons appear to argue that the district court should have excluded four of the six jurors who were impaneled for cause because they were current State Farm policy holders. A footnote in Dean supports their argument insofar as it suggests that jurors who pay their own premiums to an insurance company may hold a pecuniary interest in the insurer such that they are impliedly biased within the scope of

RCW 4.44.180(4). Dean, 62 Wn. App. at 836 n. 4. However, a significant question of constitutional law usually does not arise from a footnote. Moreover, the law surrounding the constitutional implications of denials of challenges for cause has become extremely complex. see. e.g., State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001); without detailed briefing, it is impossible to know whether this case presents an appropriate issue for discretionary review.

The Allisons have been afforded two opportunities to demonstrate a basis for discretionary review by this court. They have failed to do so. Discretionary review is denied.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 3rd day of January, 2003.

s/_____
Court Commissioner

APPENDIX C

THE SUPREME COURT OF WASHINGTON

JAMES E. ALLISON and FLORA ALLISON, Petitioners, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondent.	NO. 74134-4 RULING DENYING EXTENSION

James and Flora Allison sued their automobile insurer, State Farm Mutual Automobile Insurance Company, for damage to their van from an automobile accident. They also alleged bad faith and violations of the Consumer Protection Act. A King County District Court jury awarded $1,404 for damage to the van, but rejected the Allisons' bad faith and Consumer Protection Act claims. On the Allisons' appeal, the King County Supeiror Court affirmed "in all respects," except

that it remanded for further consideration of an attorney fee request.

The Allisons then filed a notice of appeal to the Court of Appeals. That court set the matter for hearing before a commissioner to determine whether the superior court's decision was appealable under RAP 2.2(a) or subject only to discretionary review under RAP 2.3(a). In response, the Allisons filed a motion for discretionary review, seemingly conceding (correctly) that the decision was not appealable. *See* RAP 2.2(c). That motion, however, was only skeletal, containing no facts, no citation to authority, and no substantive argument directed either to the criteria for granting review or to the underlying case. Commissioner Craighead therefore denied review, and a panel of judges denied a motion to modify that ruling. The judges' order also denied the Allisons' "Motion for Recusal of Judges/Commissioners and Their Close Relatives if State Farm Insureds." The Allisons now seek review by this court.

The Allisons styled their initial pleading to this court as a petition for review, and purport to rely upon the criteria for granting review set forth in RAP 13.4(b). Because the Court of Appeals never accepted review, however, the court's decision was "interlocutory." *See* RAP 12.3(a)(1) and (b).[1] Review by this court is thus only available by motion under RAP 13.5, and the applicable criteria for granting review are found in RAP 13.5(b). *See* RAP 13.3(c). The petition will be given effect as a motion. RAP 13.3(d).

But whether a petition or motion, the Allisons' threshold problem is that their pleading was not timely filed. The Court of Appeals entered its order on May 7, 2003. A motion or petition was thus due on Friday, June 6, 2003. RAP 13.5(a); 13.4(a). Reportedly because of heavy Seattle traffic, the Allisons' counsel did not arrive at the Court of Appeals with his pleading until after 5 p.m., when the Clerk's Office

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[1] Contrary to the Allisons' contention, the decision was not a "decision terminating review" simply because there is no avenue for further review as a matter of right. The rules are quite clear.

had closed.[2] Counsel actually filed the pleading, along with a motion for an extension of time, the following Monday.

An extension of time to file a motion for discretionary review of a Court of Appeals decision will be granted only in extraordinary circumstances and to prevent a gross miscarriage of justice. RAP 18.8(b).[3] For circumstances to be extraordinary, the party seeking the extension must show that "despite reasonable diligence," the filing was late "due to excusable error or circumstances beyond the party's control." *Reichelt v. Raymark Indus., Inc.* 52 Wn. App. 763, 765, 764 P.2d 653 (1988); *see also Shumway v. Payne*, 136 Wn.2d 383, 394-97, 964 P.2d 349 (1998). Heavy traffic in downtown Seattle on Friday afternoon is commonplace. Failure to plan for it is hardly reasonable diligence or excusable error.

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[2] While the motion should have been filed in this court, filing in the Court of Appeals would not by itself have been a fatal error. *See* RAP 18.23.

[3] This rule is specifically excepted from the directive that cases generally "will not be determined on the basis of compliance or noncompliance" with the Rules of Appellate Procedure. RAP 1.2(a).

Nor is an extension necessary to prevent a gross miscarriage of justice. As noted above, the Court of Appeals regarded the Allisons' initial motion for discretionary review as wholly inadequate. The Allisons dispute this, pointing out that attached to the two-page motion were 30+ pages of appendices, among which were copies of two memoranda that had been submitted to the superior court.[4] But this sort of "incorporation by refernce" is not an acceptable way to present argument to an appellate court. *State v. Kalakosky*, 121 Wn.2d 525, 540 n.18, 852 P.2d 1064 (1993); *State v. Brett*, 126 Wn.2d 136, 205, 892 P.2d 29 (1995); *US West Communications v. WUTC*, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997); *Patterson v. Superintendent of Public Instruction*, 76 Wn. App. 666, 676, 887 P.2d 411 (1994) The Allisons' expanded argument to this court similarly cannot be fairly used to claim that the Court of

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[4] The Allisons later attached a different superior court memorandum to the "Motion for Reconsideration" of Commissioner Craighead's ruling that the Court of Appeals treated as a motion to modify

Appeals erred in its assessment of the arguments made to that court.

Thus, because the stringent test of RAP 18.8(b) is not met, the motion for an extension must be denied. I also note, however, that even if an extension was warranted, and even ignoring the inadequacies of their argument to the Court of Appeals, I would deny the Allisons' motion for discretionary review.

On the merits, the Allisons first argue that the trial court erroneously seated several jurors who were or had been insured by State Farm. But the record on this point is at best sketchy. And while a prospective juror's relationship with State Farm might have provided grounds for challenge had counsel pursued the matter more thoroughly or made a clearer record, he did not. And as to the Allisons' motion to recuse any Court of Appeals judges insured by State Farm, that court's order states that "there is no conflict of interest." The Allisons do not address this apparent disclaimer.

Finally, the Allisons urge that the facts "proven" at trial establish their entitlement to judgment as a matter of law on their claims for violation of administrative rules adopted by the insurance commissioner. But they provide no trial record. And their legal argument, described by Commissioner Craighead as "completely indecipherable," has not improved substantially by subsequent expansion.

The moton for an extension of time to file a motion for discretionary review is denied. The Court of Appeals was fully justified in finding no basis for review under the criteria of RAP 2.3(d).

s/_____
COMMISSIONER

September 16, 2003